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VIRGINIA LAW REGISTER.

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OUR attention has been called to a palpable error in the editorial notice of the case of *Singafus v. Porter*, in our December number (p. 571). The statement is made that the proper measure of damages for a breach of warranty of quality on the sale of a chattel is the "difference between the contract price and the reasonable market value of the property had the warranty been true."

The measure of damages should have been stated to be, of course, the difference between the actual value of the thing as delivered and the value it would have possessed had it answered to the warranty. In such case the contract price is generally immaterial. See 1 Va. Law Reg. 470.

WITH the close of Volume XII, Mr. H. W. Fuller announces his retirement as editor of the *Green Bag*, a position which he has filled most acceptably to the readers of that entertaining journal since its inception. The REGISTER contemplates Mr. Fuller's retirement with cordial regret; and while congratulating him upon his well-earned rest not less heartily than upon his successful conduct of the magazine, it begs to assure him that he has prolonged the life and added to the avoidupois of more lawyers than he wots of, by the entertainment with which he has provided them from month to month.

Mr. Fuller is succeeded by Mr. Thomas Tileston Baldwin—whose surname suggests *Flush Times*, and promises well as a purveyor of the humorous in the law.

IN *Chapin v. Fye*, 21 Sup. Ct. 71, the defendant, on the trial in the State court, meaning to raise the question of whether the State statute upon which the plaintiff's claim was based, did not deprive the defendant of his property without due process of law, based his contention on the "due process of law" clause in the 5th Amendment to the

Constitution of the United States, instead of the same clause in the 14th Amendment.

The Supreme Court of the United States held, in what appears to be an extremely technical ruling, that as the 5th Amendment operates only on the Federal courts, the constitutionality of the statute was not properly raised in the State court, and that the defendant could not afterwards, on appeal to the Supreme Court, rely upon the same clause in the 14th Amendment. Mr. Justice Brown dissented.

IN *Chesapeake & Ohio Railway Co. v. Dixon*, 21 Sup. Ct. 67, it was held that an action in a State court for personal injuries against a railroad company, incorporated under the laws of another State, could not be removed by the railroad company to a Federal court, where the engineer and fireman, whose alleged negligence caused the injury, were united as co-defendants, and were citizens of the State in which the action was brought.

It is unusual in personal injury cases against railroad companies to unite the negligent employees, but as the servant whose negligence caused the injury is equally liable with the master, the plaintiff may, at his election, sue either or both; and when he thus elects to sue both, the action becomes joint against both, and, as held by the court, there is no separable controversy. Hence it follows that as the whole controversy cannot be removed to the Federal court, by reason of some of the defendants being citizens of the same State with the plaintiff, the Federal court has no jurisdiction, on the ground of diverse citizenship, of any part of it. Mr. Justice Harlan and Mr. Justice White dissented.

The plaintiff probably united the employees as co-defendants, for the purpose of preventing a removal to the Federal court, and the successful result will doubtless revolutionize the practice in tort actions against foreign corporations in the State courts.

THE case of *Dingus v. Minneapolis Improvement Co.*, recently decided by the Supreme Court of Virginia (2 Va. Sup. Ct. Rep. 604), affords a striking illustration of the principle, several times announced by the same court, that, in the absence of statutory enactments, a creditor can subject only the actual interest of his debtor to the lien of a judgment. Expressed otherwise, the judgment creditor is in no sense a purchaser, and (in the absence of statute or of fraud) is generally bound by all the equities affecting the debtor—in effect, standing in

his shoes. It was upon this principle that the celebrated case of *Floyd v. Harding*, 28 Gratt. 401, was based. The precise point there established was that where a purchaser of real estate failed to record his conveyance, whereby subsequent judgments against his grantor took priority over it, he might yet repel the judgment creditors by proof of a previous parol contract, followed by possession and payment of the purchase money before the recovery of the judgments. Such an executory contract was not required by the statute to be recorded; and being specifically enforceable against the vendor, by reason of possession taken and purchase money paid, such unwritten and unrecorded equity in the vendee was held equally binding upon the judgment creditors of the vendor.

The facts in the *Dingus* case are somewhat complicated, but in substance were these:

1. Banner conveyed to Rosser certain real estate, by a deed absolute on its face. There was, however, a contemporaneous written agreement, creating Rosser (who was the president of several land companies engaged in "booming" the land in question) a trustee for the joint benefit of himself and Banner; Rosser undertaking to handle the property for their joint benefit.

2. Subsequently, and as a part of the plan of operations, Rosser, for a nominal consideration, conveyed the property to A. Co., of which he was president—the company having full knowledge of all the circumstances—and that company shortly afterwards conveyed the property to B. Co., of which Rosser was also president, and which was organized for the especial purpose of furthering the "booming" plans of Rosser and his associates. The last named company was cognizant of Banner's equitable interest at the time of this conveyance.

At this point, therefore, the legal title was in the B. Co., which held it subject to the trust in Banner's favor.

3. Subsequently, Banner conveyed his entire (equitable) interest in the property to Rosser, individually (but in fact acting for the B. Co.)—this conveyance reciting a cancellation and release of the previous collateral contract, and a purchase of the entire property by Rosser from Banner, at \$90,000, and Banner retained a vendor's lien on the equitable interest thus conveyed, to secure the deferred installments of purchase money.

4. All of the foregoing conveyances were duly recorded.

5. Subsequently, the B. Co.—which had assumed and paid a large

part of the purchase money due to Banner under the last mentioned conveyance to Rosser, its president—entered into a compromise with Banner, under which the latter agreed to accept, in full payment of the balance of his unpaid purchase money, all of the original tract remaining unsold to purchasers of lots into which it had been divided. In pursuance of this agreement, the B. Co. conveyed the remainder to Banner, thereby reinvesting him with the legal title.

6. Before Banner placed this last deed of record, judgments were recorded and docketed against his grantor, the B. Co., and a bill was filed to subject the land to the payment thereof.

The contest was, therefore, between Banner and the judgment creditors of his grantor, the B. Co. The creditors contended that by failure to record the conveyance from the B. Co.—a conveyance which, they asserted, settled and merged all previous claims and negotiations—their judgments become a lien on the property, prior to any claim of Banner.

The court held, however, very properly, that while the conveyance was void as to the creditors of the B. Co., because of non-recording, there was a previous equity still existing in Banner, upon which he might rely, namely, his claim for the unpaid purchase money secured by a vendor's lien reserved on the equitable interest conveyed to Rosser, acting for the B. Co. This equitable lien, though at law merged in the subsequent transaction by which Banner acquired the legal title, in express satisfaction of the equitable lien, the court properly treated as still subsisting for the protection of Banner—just as in *Floyd v. Harding* (*supra*) the previous equity of the purchase, arising from taking possession and paying the purchase money, was held not to have been merged in a subsequent conveyance from the vendor to the vendee, which, by reason of non-recording, was void as to the judgment creditors of the grantor.

The same principle is illustrated in *Borst v. Nalle*, 28 Gratt. 423, where judgments against the holder of the legal title were held not to be liens as against one who showed himself to be the real owner, under operation of a resulting trust, established by parol.

As indicated by the facts stated, the principal case was one of unusual complications, but the conclusions are carefully worked out by Cardwell, J., and seem to meet the justice of the case, viewed either from a legal or a moral standpoint.